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No. 86-870 (6)

In The

Supreme Court of the United States

October Term, 1986

PHILLIPS PETROLEUM COMPANY, and CINQUE BAMBINI PARTNERSHIP,

Petitioners,

vs.

STATE OF MISSISSIPPI and SAGA PETROLEUM U.S., INC.,

Respondents.

BRIEF AMICUS CURIAE OF THE CITY OF ELIZABETH, NEW JERSEY, A MUNICIPAL CORPORATION and NEW JERSEY LAND TITLE ASSOCIATION, A NEW JERSEY CORPORATION

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MOTION TO FILE BRIEF AMICI CURIAE OUT OF TIME

1. As soon as *amici curiae* became aware of the Petition for a Writ of Certiorari to the Supreme Court of Mississippi in this matter, they moved promptly at meetings of their respective governing bodies to authorize the filing of a brief *amici curiae* on their behalf and in support of the petition. The City Council of Elizabeth was the last to act, authorizing on February 10, 1987 the filing of this brief.

2. The *amici curiae* previously sought a final adjudication

of the nature and scope of the sovereign ownership rights of their state in *City of Newark v. Natural Resource Council*, 82 N.J. 530, 414 A. 2d 1304 (1980), *cert. denied*, 449 U.S. 983 (1980).

3. The brief *amici curiae* stresses the national importance of the issue presented as it defines the sovereign ownership rights of the 13 original states and the states thereafter admitted to the Union under the Equal Footing Doctrine.

4. Allowing the filing of the brief *amici curiae* out of time, will not delay the consideration of the Petition for a Writ of Certiorari and will not prejudice any party.

Wherefore, the City of Elizabeth, New Jersey and the New Jersey Land Title Association pray for an order allowing the filing of an *amici curiae* brief in their behalf out of time in the above-captioned case.

Respectfully submitted,

JOHN R. WEIGEL
Attorney for Amici Curiae

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INTEREST OF THE AMICI CURIAE

The petition for certiorari of the petitioners in this action presents an issue of importance to the 50 states and their political subdivisions and citizens concerning the ownership rights a state possesses as an incident of its domestic sovereignty.

The *amicus curiae* City of Elizabeth is a municipal corporation, situated in Union County, New Jersey, and a political subdivision of the State of New Jersey. It owns of record certain lands in Elizabeth which are non-navigable but claimed to be owned in fee simple absolute by New Jersey on the basis of the tideland doctrine, a substantive real property law doctrine of the state which holds that lands now or formerly flowed, naturally, by the mean high tide are state-owned, without regard to whether or not they were ever navigable.

The *amicus curiae* New Jersey Land Title Association is a New Jersey corporation and the trade association of the title insurance underwriters which write substantially all of the title insurance written in New Jersey. Title insurance indemnifies owners and mortgagees for losses, including losses arising from defects of title. Up until the late 1950's New Jersey applied a dual test of navigability and tidal ebb and flow as the basis for its sovereign ownership rights. Thereafter, New Jersey eliminated the navigability element of the test of sovereign ownership and expanded its ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable. The member companies of the New Jersey Land Title Association have insured the private record ownership of numerous titles which are today claimed to be owned by New Jersey as a result of its expansion of its sovereign ownership claims into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

BRIEF SUBMITTED PURSUANT TO RULE 36.4

This brief *amicus curiae* is submitted pursuant to Rule 36.4, the City of Elizabeth being a political subdivision of the State of New Jersey.

SUMMARY OF ARGUMENT

The sovereign ownership rights of the 50 states are dependent upon federal constitutional principles which define the nature and scope of their domestic sovereignty, and those sovereign ownership rights are not dependent, in the first instance, upon the substantive real property law of each of the 50 states. As of the date of its entry into the Union, federal constitutional principles relating to the state's domestic sovereignty limit its sovereign ownership rights to the navigable waterways within its boundaries. Thereafter, the substantive real property law of the state determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. Likewise, a state thereafter may resign certain of its sovereign ownership rights, as New Jersey has done with respect to fresh water navigable waterways, but it may not retroactively expand its sovereign ownership rights into vast areas of interior, tide-flowed meadowlands and wetlands which are not, and never have been, navigable.

ARGUMENT

THE SOVEREIGN OWNERSHIP RIGHTS OF THE 50 STATES ARE LIMITED BY FEDERAL CONSTITUTIONAL PRINCIPLES TO THE NAVIGABLE WATERWAYS WITHIN THEIR BOUNDARIES.

At the time of the American Revolution, the people of each of the 13 original states became themselves sovereign and, in that capacity, hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the United States Constitution to the general government.[1] *Martin v. The Lessee of Waddell,* 41 U.S. 367, 410 (1842). Under the Equal Footing Doctrine new states, upon their admission to the Union, acquired title to the lands underlying navigable waters within their boundaries. *Pollard's Lessee v. Hagan,* 3 Howard 212 (1845); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company,* 429 U.S. 363, 370 (1977).

The nature and scope of the domestic sovereignty of the 50 states is dependent upon federal constitutional principles and not upon the substantive real property law of each of the 50 states. *Id.,* 429 U.S. at 374 and 381. The parity between the 50 states as respects political standing and sovereignty is a federal constitutional requirement. *United States v. Texas,* 339 U.S. 707, 719-720 (1949). The ownership of navigable waters and the soils under them within state boundaries is "an inseparable attribute of the political sovereignty guaranteed equally to all States . . ." *United States v. Louisiana,* 363 U.S. 1, 77 (1960). *See United*

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1. Article 1, Sec. 8 of the United States Constitution created a navigational servitude in favor of the federal government under which navigable waters are within the control of the United States for the purpose of regulating and improving navigation. *Gibson v. United States,* 166 U.S. 269, 271-271 (1897).

States v. Texas, supra at 716.

A state's sovereign ownership rights are initially fixed at the time of its entry into the Union to the beds of the navigable waterways within its boundaries. Thereafter, the substantive real property law of the state determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra* at 370-371 and 377-378. In general, the states are at liberty to resign or convey their title to riparian proprietors, subject only to the paramount right of navigation over the waters. The Court observed in *Barney v. Keokuk*, 94 U.S. 324, 339 (1876):

> If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

The purpose underlying sovereign ownership of waterways is the protection of public rights of navigation and commerce from private interruption and encroachment. *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 436 (1892). The definition of "navigability" which was formulated by the Court and has been followed generally in this country is found in *The Daniel Ball*, 77 U.S. 557, 563 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the

customary modes of trade and travel on waters.'"[2]

CONCLUSION

The expansion by the State of Mississippi of its sovereign ownership claims into tidal wetlands which are not, and never have been, navigable violates federal constitutional principles which limit its ownership rights to the navigable waterways within its boundaries.

The issue here involved implicates all 50 states, and the Supreme Court of the United States should now clarify that, at the time of their entry into the Union, the sovereign ownership rights of all of the states were limited by federal constitutional principles to the navigable waterways within their boundaries. For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Mississippi.

Respectfully submitted,

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2. An erroneous declaration of Chancellor Kent in an early decision, which he later carried into his *Commentaries*, resulted in the admiralty jurisdiction of the United States being limited to tidal waters until 1851 when the Court decided *The Propeller Genesee Chief v. Fitzhugh*, 12 Howard 441. The differences in geography between England and the United States contributed to this erroneous view of the common law rule on navigable waters. In England, no waters are navigable in fact, at least to any great extent, which are not subject to the tide. Accordingly, "navigability" and "tidal ebb and flow" are synonymous terms, and "tidal ebb and flow" became the familiar mode of describing a public river.